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12 *Company, et al.*

13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA  
15

16 ARTHUR LEE ALFRED II, et al.,

17 Plaintiffs,

18 vs.

19 THE WALT DISNEY COMPANY,  
20 et al.,  
21

22 Defendants.  
23  
24  
25  
26  
27  
28

Case No. 2:18-cv-08074-CBM-AS

**DEFENDANTS' NOTICE OF  
MOTION AND MOTION TO  
DISMISS PLAINTIFFS'  
COMPLAINT; MEMORANDUM  
OF POINTS AND AUTHORITIES  
IN SUPPORT THEREOF**

Judge: Hon. Consuelo B. Marshall

Date: January 2, 2019

Time: 10:00 a.m.

Ctrm: 8B

1                   **NOTICE OF MOTION AND MOTION TO DISMISS**

2           PLEASE TAKE NOTICE that on January 2, 2019, at 10:00 a.m., before the  
 3 Honorable Consuelo B. Marshall, in Courtroom 8B of the above-captioned Court,  
 4 located at 350 W 1st Street, Suite 4311, Los Angeles, CA 90012-4565, defendants  
 5 The Walt Disney Company; Disney Enterprises, Inc.; Walt Disney Motion Pictures  
 6 Group, Inc.; Disney Consumer Products, Inc.; Disney Consumer Products and  
 7 Interactive Media, Inc.; Disney Book Group, LLC; Disney Interactive Studios, Inc.;  
 8 Disney Store USA, LLC; Walt Disney Attractions Technology LLC; Walt Disney  
 9 Theatrical Recordings; Walt Disney Parks and Resorts U.S., Inc.; ABC, Inc.; Buena  
 10 Vista Home Entertainment, Inc.; Buena Vista Media; Buena Vista Productions;  
 11 Buena Vista Theatres, Inc.; Buena Vista Theatrical Group Ltd.; Buena Vista Video  
 12 On Demand; Buena Vista Books, Inc.; Buena Vista Catalogue Co. and Buena Vista  
 13 Non-Theatrical, Inc.<sup>1</sup> (collectively, “Disney” or “Defendants”) will and hereby do  
 14 move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss  
 15 with prejudice Plaintiffs’ Complaint filed on November 14, 2017.<sup>2</sup>

16           The Complaint alleges that Disney’s five *Pirates of the Caribbean* motion  
 17 pictures, released between 2003 and 2017, infringe Plaintiffs’ copyright in a  
 18 screenplay from 2000. The Complaint fails to state a claim of copyright  
 19 infringement because the works at issue are not substantially similar as a matter of  
 20 law: after filtering out generic, unprotectable elements of the pirate genre, no  
 21

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22  
 23 <sup>1</sup> The Complaint originally named as defendants “Disney Consumer Productions,  
 24 Inc.” and “Disney Consumer Productions and Interactive Media, Inc.” These entities  
 25 do not exist. For purposes of this Motion, Defendants assume that Plaintiffs  
 26 intended to name “Disney Consumer Products Inc.” and “Disney Consumer  
 Products and Interactive Media Inc.” Further, in April 2018 “Walt Disney Parks  
 and Resorts Worldwide” changed its name to “Disney Parks, Experiences and  
 Consumer Products.”

27 <sup>2</sup> The Complaint was filed in the District of Colorado (No. 1:17-cv-02729-PAB-  
 28 KMT, ECF No. 1). On September 14, 2018 Judge Philip A. Brimmer of the District  
 of Colorado entered an order granting Defendants’ motion to transfer venue to the  
 Central District of California. (ECF No. 56.)

1 reasonable observer could find the works are substantially similar. This defect  
2 cannot be cured by amendment and requires that the Complaint be dismissed with  
3 prejudice.

4 This Motion is based on this Notice of Motion and Motion, the accompanying  
5 Memorandum of Points and Authorities, Request for Judicial Notice, and  
6 Declarations of J. Max Rosen and Diego Parras, all pleadings and papers of record  
7 and on file in this case, and such additional authority and argument as may be  
8 presented at or before the time this Motion is submitted.

9 This Motion is made following the conference of counsel pursuant to L.R. 7-  
10 3, which took place on November 9, 2018.

11  
12 DATED: November 16, 2018 MUNGER, TOLLES & OLSON LLP  
13 GLENN D. POMERANTZ  
14 MELINDA E. LEMOINE  
15 JORDAN D. SEGALL  
16 J. MAX ROSEN

16 By: /s/ Melinda E. LeMoine  
17 MELINDA E. LEMOINE  
18 Attorneys for Defendants The Walt Disney  
19 Company et al.  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Complaint should be dismissed with prejudice because it does not plausibly plead that the works at issue—Plaintiffs’ *Pirates of the Caribbean* spec screenplay (the “Screenplay”), on the one hand, and Disney’s five *Pirates of the Caribbean* motion pictures, on the other—share substantially similar copyrightable elements. *Pasillas v. McDonald’s Corp.*, 927 F.2d 440, 442 (9th Cir. 1991). No amendments to the pleadings can change this.

The Screenplay and the Disney pictures share only some generic elements commonplace in stories about pirates: ship captains, mutinies, swordfights, rum, ghosts, and the like. Copyright protects only concrete expression, not such generic elements. Further, Plaintiffs concede that many of these elements appear in the Screenplay because they “incorporat[ed] the basic elements” from Disney’s *own* *Pirates of the Caribbean* theme park ride. (Compl. ¶ 26.) Plaintiffs’ attempt to claim copyright ownership of elements inspired by Disney’s own ride is frivolous.

Beyond the generic, the works tell fundamentally different stories with different characters, plots and themes. The Screenplay tells the story of a band of orphan children on a pirate adventure. The Disney pictures, which do not feature children, instead tell the story of a dissolute, charismatic pirate captain—Captain Jack Sparrow—who does battle against a series of foes. No amount of pleading can make these works substantially similar as a matter of law, and because no pleading amendments can change this, the Court should dismiss the Complaint with prejudice.

### II. BACKGROUND

#### A. Factual and Legal Allegations

Plaintiffs allege that between October 1999 and October 2000, while they were working with Disney on an unrelated project, Arthur Lee Alfred II and Ezequiel Martinez, Jr. developed an idea for an original “spec” screenplay called



1 *Pirates of the Spanish Main*. (Compl. ¶¶ 22, 24.) Plaintiffs allege they were aware  
 2 that Disney had recently considered producing a motion picture based on the well-  
 3 known *Pirates of the Caribbean* rides at Disney theme parks. (*Id.* ¶ 31.) For that  
 4 reason, their screenplay was retitled *Pirates of the Caribbean*, and Plaintiffs  
 5 “incorporate[d] the basic elements” of Disney’s ride into the Screenplay. (*Id.* ¶¶ 25–  
 6 26.) The Complaint alleges Alfred and Martinez completed a final draft of the  
 7 Screenplay on July 19, 2000, and a few weeks later mailed it to Disney with a cover  
 8 letter, “Sizzle Reel” and original artwork.<sup>3</sup> (*Id.* ¶¶ 28, 30.) The cover letter  
 9 described the script as “a swashbuckling fun adventure, ‘Goonies’<sup>4</sup> meets ‘Pirates of  
 10 the Caribbean.’” (*Id.* Ex. 2.) Plaintiffs allege that Disney responded that it was  
 11 going to pass on the project in part “due to children being in [the Screenplay].” (*Id.*  
 12 ¶ 41.)

13 Three years later, Disney released the first *Pirates of the Caribbean* motion  
 14 picture, subtitled *The Curse of the Black Pearl*. (*Id.* ¶ 49.) Disney subsequently  
 15 released four sequels: *Dead Man’s Chest* (2006); *At World’s End* (2007); *On*  
 16 *Stranger Tides* (2011); and *Dead Men Tell No Tales* (2017). Plaintiffs allege that  
 17 many similarities exist between the Screenplay and *The Curse of the Black Pearl*,  
 18 and that those “similarities have continued throughout the entire ‘*Pirates of the*  
 19 *Caribbean*’ franchise.” (*Id.* ¶¶ 50–51.)

20 Plaintiffs filed their Complaint on November 14, 2017 (ECF No. 1),  
 21 purporting to state five different counts—violations of their rights to reproduction,  
 22 preparation of derivative works, distribution, public performance, and public  
 23 display—but only alleging one theory: the *Pirates of the Caribbean* pictures  
 24 \_\_\_\_\_

25 <sup>3</sup> This “original artwork”—a sample poster from the Screenplay—is attached as  
 26 Exhibit 5 to the Complaint. A cursory review of the poster makes clear, however,  
 27 that it is simply a mash-up of posters from two well-known pirate pictures that most  
 28 obviously inspired the Screenplay: *The Goonies* and *Cutthroat Island*.

<sup>4</sup> *The Goonies* was a 1985 motion picture about a group of children who discover an  
 old Spanish map that leads them on an adventure to find the treasure of a legendary  
 pirate named One-Eyed Willy. See [https://en.wikipedia.org/wiki/The\\_Goonies](https://en.wikipedia.org/wiki/The_Goonies).

1 infringe the Screenplay. (Compl. ¶¶ 72–109.)

2 As explained in the concurrently-filed Request for Judicial Notice (“RJN”),  
3 the Complaint incorporates the Screenplay, the *Pirates of the Caribbean* pictures,  
4 and Disney’s Pirates of the Caribbean theme park rides as they existed when the  
5 Screenplay was drafted. The Court, therefore, should review and consider the  
6 contents of these works. *See, e.g., Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir.  
7 2005) (incorporation by reference doctrine permits the court to consider documents  
8 whose contents are alleged in a complaint and whose authenticity no party  
9 questions, but which are not physically attached to the pleading).

#### 10 **B. Plot of the Screenplay<sup>5</sup>**

11 The Screenplay opens with a prologue, in which a privateer ship and a pirate  
12 ship exchange cannon fire. (Compl. Ex. 1, ECF No. 1-1 (“Screenplay”) at 1.) The  
13 privateers win, but their captain, the “sinister” Captain Jack Nefarious, reveals  
14 himself to be in league with Davey<sup>6</sup> Jones, a “dashing young rogue” who was once a  
15 privateer. (*Id.* at 2.<sup>7</sup>) When Jones refuses to give Nefarious his half of a treasure  
16 map, Nefarious takes hostage Jones’s love interest, Jane, and offers to trade her for  
17 the map. (*Id.* at 10.) Jones hesitates, and Nefarious drops Jane into the sea. (*Id.* at  
18 11.) A sea monster appears and drags Nefarious under the waves as Jones escapes.

19 Ten years later, in the streets of a shipping port, the protagonists are  
20 introduced: a band of six orphans who call themselves the Rascal Scoundrels. (*Id.*  
21 at 13.) They range from ages 7 to 15, each with a nickname (Stink is plump and  
22 flatulent, Clumsy is uncoordinated and prone to stuttering, Littles is the youngest,  
23

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24 <sup>5</sup> Defendants apologize for the length of the following plot summaries, but believe  
25 they are required for the record in light of the breadth of Plaintiffs’ claims, which  
26 allege infringement with respect to dozens of elements in the five motion pictures.

27 <sup>6</sup> Although the figure from nautical folklore is spelled “Davy” Jones, Plaintiffs’  
28 character is named “Davey” Jones.

<sup>7</sup> Page number references to the Screenplay refer to the script’s original page  
numbers in the upper-right corner of the page.

1 and so on). (*Id.* at 13–14.) They want one thing: to become pirates.

2 At an “auction of wenches”—a plot element taken from Disney’s ride (*see*  
3 RJN at 5)—the children claim to be the “crew of the dreaded pirate, Davey Jones.”  
4 (*Id.* at 15.) They are overheard by a mysterious “Woman in Red” (who is also  
5 depicted in the ride). (*Id.*) The children come across a group of “six drunk  
6 Midgets” in pirate garb and steal their clothes. (*Id.* at 21–22.) Dressed as pirates,  
7 the Rascals return to Jones’s ship, revealing him to be their caretaker. (*Id.* at 23.)  
8 He is passed-out drunk. The Rascals search his cabin and find his half of the  
9 treasure map. (*Id.* at 26.)

10 As Jones wakes up and heads to the pub, a ship rolls into port and a crew of  
11 pirates emerges. (*Id.* at 30.) In the bar, the Woman in Red appears and Jones  
12 recognizes her: it is Jane. (*Id.* at 34–35.) Meanwhile, the Rascals concoct a plan to  
13 steal Nefarious’s treasure map. (*Id.* at 36.) They board the pirate ship, unlock secret  
14 rooms, encounter skeletons and ultimately obtain a scroll. (*Id.* at 37, 41–44.)

15 Back at the pub, Nefarious and his crew arrive (including Stitch and Dagger).  
16 Stitch and Dagger are not ghosts, but pirates with their faces painted to look like  
17 skulls. (*Id.* at 46.) Jane betrays Jones, delivering him to Nefarious. (*Id.* at 52.)  
18 Nefarious, not realizing the Rascals have the map, orders Jane to search Jones’s  
19 pockets, but privateer boats open fire on the city, and Jones escapes. (*Id.* at 53.)

20 Jones joins the Rascals aboard Nefarious’s ship. (*Id.* at 56–57.) Nefarious  
21 hijacks one of the privateer ships and sets sail after them. (*Id.* at 58–59.) On  
22 Nefarious’s ship, the Rascals tell Jones they have a scroll indicating where  
23 Nefarious has hidden his half of the treasure map and implore Jones to act like the  
24 great Davey Jones of yore and help. (*Id.* at 60–61.) Jones refuses, noting he lost  
25 everything “all for the evil of men’s greed for treasure.” (*Id.* at 61.) The Rascals  
26 knock him out and set sail for Calavera Island, where Nefarious’s map is located.  
27 (*Id.* at 62.) On the island, they recover the treasure map but run straight into  
28 Nefarious and his crew. (*Id.* at 65–75.)

1       Dragged back to Nefarious’s boat, the Rascals see no sign of Jones. When  
 2 Nefarious orders the Rascals to walk the plank, Jones appears and challenges  
 3 Nefarious. (*Id.* at 79.) In the ensuing chaos, one of the Rascals grabs the map and  
 4 escapes over the deck with the others into a rowboat. Jones fights and defeats Stitch  
 5 and Dagger, then escapes the ship with Jane as it explodes. (*Id.* at 86.) The Rascals  
 6 begin to cry, thinking Jones is dead. (*Id.* at 88.) Now recognizing the evils of  
 7 piracy, they throw their pirate hats overboard and rip up the map. (*Id.* at 89.) A  
 8 current seizes the rowboat and they drift into a cove, where they plunge into a  
 9 cavern (“like the Disneyland ride,” as the script notes). (*Id.* at 91.) Finally they  
 10 come to a jewel-studded room; they have found the treasure. (*Id.* at 92.)

11       Nefarious appears with his crew and Jones reveals he is still alive. Jones tells  
 12 Nefarious that if he takes the jewels, the room will fill with water, killing them all.  
 13 (*Id.* at 93.) Nefarious orders his men to take the treasure anyway, and a fight ensues.  
 14 Jones stabs Nefarious and escapes with Jane and the Rascals. (*Id.* at 97.) The sea  
 15 monster returns and eats Nefarious. In the epilogue, Jones becomes a privateer  
 16 again, accompanied by Jane and the Rascals as his crew. (*Id.* at 103–04.)

### 17       **C. Plot of the Disney *Pirates of the Caribbean* Motion Pictures**

18       Disney’s five *Pirates* pictures total 12 hours over five feature-length stories,  
 19 telling an epic and morally ambiguous tale of piracy and supernatural monsters.

#### 20       **1. *The Curse of the Black Pearl***

21       The first in the series, *The Curse of the Black Pearl*, begins with a young  
 22 Elizabeth Swann encountering Will Turner floating on a plank with a medallion  
 23 around his neck. Realizing that the medallion marks him as a pirate, Elizabeth steals  
 24 it to protect Will from being found out and arrested.

25       A few years later, Elizabeth is a young woman, her father is the colonial  
 26 governor on Jamaica, and Will is a blacksmith. Jack Sparrow—the central character  
 27  
 28

1 in all five pictures—arrives at the same port. (*Curse of the Black Pearl* at 9:09.<sup>8</sup>)  
 2 At a ceremony making him Commodore, James Norrington asks Elizabeth to marry  
 3 him. Unable to breathe in her corset, she falls over a cliff into the water. Sparrow  
 4 reluctantly jumps in to save her. Norrington recognizes Sparrow from a tattoo and  
 5 attempts to arrest him for piracy. (*Id.* at 17:44.) Sparrow hides in Will’s workshop,  
 6 but Will recognizes and captures him. (*Id.* at 22:44.)

7 A dark ship, the *Black Pearl*, appears at the port and lays siege to the town.  
 8 (*Id.* at 29:15.) Two pirates from the crew find Elizabeth and she demands to see  
 9 their captain. (*Id.* at 34:34.) Crewmembers also visit Sparrow in his jail cell. As  
 10 one pirate reaches through the bars of Sparrow’s cell, his arm becomes a skeleton in  
 11 the moonlight. (*Id.* at 37:30.)

12 On the *Black Pearl*, Elizabeth meets captain Hector Barbossa. He agrees to  
 13 leave the port, but brings Elizabeth with him. On shore Norrington, the Governor  
 14 and Will debate how to save her. Will asks Sparrow for help. After first stating he  
 15 sees no profit in doing so, Sparrow agrees, and he and Will set off for Tortuga to  
 16 assemble a crew. In Tortuga, they find Gibbs, a man who once served under  
 17 Norrington’s command and is now Sparrow’s friend. (*Id.* at 53:55.) As they pursue  
 18 the *Black Pearl*, Gibbs tells Will that Sparrow used to be the *Black Pearl*’s captain,  
 19 but Barbossa mutinied and marooned him on an island. Gibbs claims Sparrow  
 20 escaped by riding a pair of sea turtles to safety.

21 Back on the *Black Pearl*, Elizabeth dines with Barbossa. He explains that his  
 22 men found the gold of Cortes, but realized too late it bore the curse of the “heathen  
 23 gods,” transforming the men into unkillable skeletons in the moonlight. (*Id.* at  
 24 1:00:26-1:00:31.) The *Black Pearl* reaches Isla de la Muerta, the resting place of  
 25 Cortes’s gold. Barbossa explains to his crew that, to break the curse, they must  
 26 return the gold medallions, as well as blood from every person who took the coins or  
 27

28 <sup>8</sup> All timestamps refer to the DVD versions of the *Pirates of the Caribbean* motion pictures submitted concurrently with this Motion. (See RJN.)

1 one of his or her descendants. (*Id.* at 1:10:37.) Barbossa is only missing a  
2 medallion and blood from a single crewmember—Bill Turner, Will’s father.  
3 Believing Elizabeth to be Turner’s child, Barbossa cuts her hand and drops a bloody  
4 medallion into the chest, but the curse is not broken. Will, hiding in the corner,  
5 knocks Sparrow out and saves Elizabeth. Barbossa’s men capture Sparrow and  
6 chase after Will, Turner’s true heir.

7 Later the *Black Pearl* catches Sparrow’s ship, and the ships battle. Will  
8 appears on the *Black Pearl* and threatens to take his own life (making the curse  
9 unbreakable). Barbossa agrees to release Elizabeth and Sparrow, and maroons them  
10 on the same island where he previously marooned Sparrow. (*Id.* at 1:33:00–  
11 1:34:00.)

12 On the island, Elizabeth asks Sparrow how he escaped. He admits the turtle  
13 story was a lie: he encountered rum runners, who have long since left the island.  
14 (*Id.* at 1:36:21.) Sparrow and Elizabeth drink rum, and Sparrow tells her the *Black*  
15 *Pearl* represents freedom to him. (*Id.* at 1:37:49). He collapses, drunk, and  
16 Elizabeth uses the rum to build a fire. The Navy sees the plumes. (*Id.* at 1:38:51–  
17 1:39:54.)

18 On board Norrington’s ship, Elizabeth pleads with her father to rescue Will,  
19 to no avail. Seeing no alternative, she promises to marry Norrington, and asks him  
20 to save Will “as a wedding gift.” (*Id.* at 1:40:51.) He agrees, and sets off in pursuit  
21 of the *Black Pearl*.

22 Back on the island, Barbossa again prepares to enact the curse-breaking ritual,  
23 this time with Will’s blood. Sparrow shows up, tells Barbossa the Navy is outside,  
24 and suggests he wait to break the curse until after they have defeated the Navy.  
25 Sparrow proposes an alliance, under which he will captain the *Black Pearl* under  
26 Barbossa’s colors. Barbossa agrees. (*Id.* at 1:47:50.) Barbossa’s skeleton crew  
27 then ambushes Norrington’s ship.

28 At the same time, Elizabeth boards the *Black Pearl* and frees Sparrow’s crew,



1 but they refuse to assist. (*Id.* at 1:58:10.) Back on the island, Barbossa stabs  
 2 Sparrow, but Sparrow survives—he has taken a piece of Cortes’s treasure and is also  
 3 cursed with immortality. (*Id.* at 1:55:33.) Elizabeth arrives on the island to save  
 4 Will. Sparrow and Will break the curse just as Sparrow shoots Barbossa dead. (*Id.*  
 5 at 2:02:04.) No longer immortal, the rest of Barbossa’s crew surrender.

6 Days later, the Navy prepares to hang Sparrow for piracy. Elizabeth declares  
 7 her love for Will, and the two help Sparrow escape to the *Black Pearl*.

## 8 **2. *Pirates of the Caribbean Vols. 2–5***

9 The next four Disney motion pictures in the franchise expand on the world,  
 10 themes and characters established by *Curse of the Black Pearl*.

11 In *Dead Man’s Chest*, Sparrow is visited by the ghost of Will’s father, a  
 12 crewman of the *Flying Dutchman* (a ship manned by half-crustacean, half-human  
 13 ghost pirates and captained by Davy Jones). Sparrow owes Jones a debt, and the  
 14 *Dutchman* is coming to collect it, along with Jones’s personal sea monster, the  
 15 Kraken.<sup>9</sup> The characters (including Will, Elizabeth, Sparrow and Norrington),  
 16 pursue the heart of Davy Jones, an object locked within the “Dead Man’s Chest”  
 17 that will allow its possessor to control Jones. Ultimately Norrington runs off with  
 18 the heart, and the Kraken attacks the *Black Pearl*, dragging Sparrow to Davy Jones’s  
 19 Locker. Norrington delivers the heart to Lord Beckett of the East Indian Trading  
 20 Company. The *Black Pearl*’s crew members hatch a plan to rescue Sparrow, and it  
 21 is revealed that Barbossa has been resurrected and will lead the rescue mission.

22 In *At World’s End*, Beckett, using Jones and the *Flying Dutchman*, is  
 23 exterminating the world’s pirates. To stop him, the pirate lords (the “Brethren”)

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24  
 25 <sup>9</sup> The motion pictures make frequent use of pirate mythology. The *Flying*  
 26 *Dutchman* was a famous ship from 17th-century mythology: it was said to have a  
 27 crew of ghosts, often portrayed as pirates. See  
 28 [https://en.wikipedia.org/wiki/Flying\\_Dutchman](https://en.wikipedia.org/wiki/Flying_Dutchman). The Kraken was a mythological,  
 tentacled sea monster. See <https://en.wikipedia.org/wiki/Kraken>. The pictures also  
 portray some of the most famous figures from pirate stories that also pre-date  
 Plaintiffs’ work, such as Blackbeard and Davy Jones.

1 must convene and use magical coins to call forth “Calypso,” a sea goddess with  
2 limitless power. They need Sparrow, who has the ninth coin. Elizabeth and  
3 Barbossa travel to Davy Jones’s Locker to retrieve him. When they return,  
4 Elizabeth is elected “pirate king.” The Brethren then summon Calypso, who was  
5 once Davy Jones’s lover but was betrayed by him. Angry, she creates a maelstrom.  
6 Sparrow discovers that whoever stabs the heart of Jones will become captain of the  
7 *Dutchman* and he seeks out the role. When Jones mortally wounds Will, however,  
8 Sparrow allows Will to take his place. Will, captain of the *Dutchman*, fights  
9 alongside the *Black Pearl*, and defeats Beckett.

10 In *On Stranger Tides*, the story pivots to Sparrow and Barbossa. Sparrow is  
11 called before the king to help Barbossa find the Fountain of Youth. Sparrow  
12 refuses, but ends up captured by Blackbeard, a ruthless pirate who seeks the  
13 Fountain. Blackbeard has a daughter, Angelica, who is a pirate herself and  
14 Sparrow’s former lover. Blackbeard, Barbossa and a Spanish armada travel to the  
15 Fountain. Sparrow learns that its water must be drunk from two chalices at once:  
16 one drinker will gain life, and the other will lose it. Ultimately, the Fountain is  
17 destroyed, but with its last drops, Sparrow gives two chalices to Angelica and  
18 Blackbeard, who both believe Angelica is sacrificing herself for her father. Instead,  
19 Blackbeard dies. Sparrow and Angelica admit their love for one another, but  
20 Sparrow maroons her on an island, afraid she will seek revenge.

21 In *Dead Men Tell No Tales*, the story shifts back to the Turners. Henry  
22 Turner, Will and Elizabeth’s son, seeks the Trident of Poseidon, believing it can  
23 break the curse of the *Flying Dutchman* and free his father. He is accompanied by  
24 Carina Smyth, an astronomer whose father’s diary appears to hold the key to finding  
25 the Trident. They are pursued by a new villain, Captain Salazar, a cursed pirate-  
26 hunter who seeks revenge on Sparrow for burning him and his crew to death.  
27 Barbossa, Sparrow, Henry and Carina sail for the Trident, and Salazar follows.  
28 Ultimately, Henry manages to get the Trident. Barbossa, in turn, admits he is



1 secretly Carina’s father, and sacrifices himself to save her from Salazar. Will, saved  
 2 from the *Flying Dutchman*, reunites with Elizabeth, as Sparrow sails off into the  
 3 distance, choosing the freedom of piracy over the confines of family and virtue.

### 4 **III. ARGUMENT**

#### 5 **A. Applicable Legal Standards**

6 To survive a Rule 12(b)(6) motion for failure to state a claim, “a complaint  
 7 must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that  
 8 is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell*  
 9 *Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The court need not “accept any  
 10 unreasonable inferences or assume the truth of legal conclusions cast in the form of  
 11 factual allegations.” *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1248 (9th Cir. 2013)  
 12 (quoting *Ileto v. Glock Inc.*, 349 F.3d 1191, 1200 (9th Cir. 2003)). Rather, the  
 13 complaint must contain sufficient concrete facts to elevate a plaintiff’s right to relief  
 14 from merely “speculative” to “plausible.” *Twombly*, 550 U.S. at 555, 570.

15 To state a copyright infringement claim a plaintiff must allege “(1) ownership  
 16 of a valid copyright, and (2) copying of constituent elements of the work that are  
 17 original.” *Funky Films*, 462 F.3d at 1076 (quoting *Feist Pubs., Inc. v. Rural Tel.*  
 18 *Serv. Co.*, 499 U.S. 340, 361, (1991)). To satisfy the second element, Plaintiffs  
 19 must plausibly allege that “the defendant had access to the plaintiff’s work and that  
 20 the two works are substantially similar.” *Id.* (internal quotation marks omitted). For  
 21 purposes of this Motion, Disney does not dispute that Plaintiffs have sufficiently  
 22 alleged access. But, because the two works are not substantially similar as a matter  
 23 of law, the Complaint must be dismissed with prejudice.

24 “Whether there is sufficient objective similarity ... is a question that may be  
 25 decided by the court as a matter of law on a motion to dismiss[.]” *Rentmeester v.*  
 26 *Nike, Inc.*, No. 3:15-cv-00113-MO, 2015 WL 3766546, at \*2 (D. Or. June 15,  
 27 2015); *see also Newt v. Twentieth Century Fox Film Corp.*, No. 15-CV-02778-  
 28 CBM-JPRX, 2016 WL 4059691 (C.D. Cal. July 27, 2016) (Marshall, J.) (dismissing

1 copyright complaint at pleadings stage for lack of substantial similarity). Where, as  
 2 here, the works at issue are incorporated into the pleadings and are “both before the  
 3 court, capable of examination and comparison,” the court can properly conclude that  
 4 the plaintiff’s complaint does not state a claim for infringement. *Christianson v. W.*  
 5 *Pub. Co.*, 149 F.2d 202, 203 (9th Cir. 1945). Non-infringement should be decided  
 6 as a matter of law when “the similarity between two works concerns only non-  
 7 copyrightable elements of the plaintiff’s work” or when “no reasonable jury,  
 8 properly instructed, could find that the two works are substantially similar.” *Allen v.*  
 9 *Scholastic, Inc.*, 739 F. Supp. 2d 642, 655 (S.D.N.Y. 2011).

10 **B. The Screenplay and the *Pirates of the Caribbean* Pictures Are Not**  
 11 **Substantially Similar as a Matter of Law**

12 Courts in the Ninth Circuit determine whether two works are substantially  
 13 similar using a two-part test. The “intrinsic test” “examines an ordinary person’s  
 14 subjective impressions,” while the “extrinsic test” is “objective in nature” and  
 15 focuses on key similarities in elements of the works. *Funky Films*, 462 F.3d at  
 16 1077. Only the extrinsic test is assessed on a motion to dismiss, and a plaintiff who  
 17 cannot satisfy the extrinsic test “necessarily loses” because “a jury may not find  
 18 substantial similarity without evidence on both the extrinsic and intrinsic tests.”  
 19 *Zella v. E.W. Scripps Co.*, 529 F. Supp. 2d 1124, 1133 n.8 (C.D. Cal. 2007) (citation  
 20 omitted).

21 The extrinsic test focuses on “articulable similarities” between eight elements  
 22 in the two works: “plot, themes, dialogue, mood, setting, pace, characters, and  
 23 sequence of events.” *Funky Films*, 462 F.3d at 1077 (quoting *Kouf v. Walt Disney*  
 24 *Pictures & Television*, 16 F.3d 1042, 1045 (9th Cir. 1994)). “The key question  
 25 always is: Are the works substantially similar beyond the fact that they depict the  
 26 same idea?” *Mattel, Inc. v. MGA Entm’t, Inc.*, 616 F.3d 904, 917 (9th Cir. 2010)  
 27 (citation omitted). “In applying the extrinsic test, th[e] court compares, not the basic  
 28 plot ideas for stories, but the actual concrete elements that make up the total

1 sequence of events and the relationships between the major characters.” *Funky*  
 2 *Films*, 462 F.3d at 1077 (internal quotation marks and citation omitted).

3 Before evaluating the works’ similarities, the court must “filter out”  
 4 unprotectable elements, such as general plot ideas and “unoriginal components” not  
 5 independently created by the inventor. *Mattel*, 616 F.3d at 913–16. Also filtered  
 6 out are *scenes a faire*, or “expressions indispensable and naturally associated with  
 7 the treatment of a given idea.” *Gable v. NBC*, 727 F. Supp. 2d 815, 832 (C.D. Cal.  
 8 2010) (quoting *Rice v. Fox Broad. Co.*, 330 F.3d 1170, 1175 (9th Cir. 2003)).

### 9 **1. Most of the Alleged Similarities Identified by Plaintiffs Are** 10 **Unprotectable and Must Be Filtered Out**

11 The principal similarity allegations in the Complaint are contained in Exhibit  
 12 5, which purports to list a number of protectable similarities between the Screenplay  
 13 and the *Pirates of the Caribbean* pictures. (See ECF No. 1-5 (hereafter  
 14 “Appendix”).) But it is well-established that a list of random similarities scattered  
 15 throughout two works cannot establish substantial similarity. And in any case,  
 16 nearly all of the purported similarities Plaintiffs identify are generic or unoriginal  
 17 elements that the Court must filter out.

18 A plaintiff cannot satisfy its burden to plead substantial similarity by listing  
 19 similar elements at random because such lists are “inherently subjective and  
 20 unreliable” and no substitute for a holistic examination of the works. *Litchfield v.*  
 21 *Spielberg*, 736 F.2d 1352, 1356 (9th Cir. 1984); see also *Murray Hill Publ’ns, Inc.*  
 22 *v. Twentieth Century Fox Film Corp.*, 361 F.3d 312, 320 (6th Cir. 2004) (“random  
 23 similarities scattered throughout the works’ can be discounted”); *Williams v.*  
 24 *Crichton*, 84 F.3d 581, 589–90 (2d Cir. 1996) (awarding judgment as a matter of  
 25 law to defendants for lack of substantial similarity between the film *Jurassic Park*  
 26 and plaintiff’s book about a dinosaur theme-park, and rejecting the relevance of a  
 27 list of similarities as “[s]uch a scattershot approach cannot support a finding of  
 28

1 substantial similarity because it fails to address the underlying issue: whether a lay  
2 observer would consider the works as a whole substantially similar to one another”).

3 For this reason, the Court should disregard the Appendix in determining  
4 whether the works are substantially similar. But even considering the Appendix  
5 would not save the Complaint, because essentially all of the purported similarities it  
6 enumerates involve unprotectable elements that must be filtered out under the  
7 extrinsic test. The Appendix repeatedly lists generic elements that appear in  
8 virtually all pirate stories: treasure maps, ghost pirates, ships flying black sails,  
9 skeletons, privateers, naval attacks, dark fog, the “pirate code,” and supernatural  
10 elements such as ghosts and sea monsters. These have appeared and will continue  
11 to appear in countless works, and many are grounded in the history of piracy itself.  
12 No author can monopolize these generic narrative building blocks. *Berkic v.*  
13 *Crichton*, 761 F.2d 1289, 1293 (9th Cir. 1985) (“General plot ideas are not protected  
14 by copyright law; they remain forever the common property of artistic mankind.”).  
15 Copyright protects only “those aspects of the work—termed ‘expression’—that  
16 display the stamp of the author’s originality.” *Harper & Row Publishers, Inc. v.*  
17 *Nation Enters.*, 471 U.S. 539, 547 (1985). Because Plaintiffs have no protectable  
18 copyright interest in these elements, they are irrelevant to the similarity analysis.

19 Indeed, it is especially unsurprising that elements such as these appear in both  
20 works at issue because both the Screenplay and Disney’s pictures were inspired by  
21 the same source material: Disney’s Pirates of the Caribbean theme park ride.<sup>10</sup> (*See*  
22 *Compl.* ¶ 26 (alleging that Plaintiffs based the Screenplay on the ride).) Disney’s  
23 ride incorporated many of the elements Plaintiffs now characterize as similarities:

24  
25 \_\_\_\_\_  
26 <sup>10</sup> That Plaintiffs took many elements from Disney’s theme park ride underscores  
27 the frivolousness of their claim. (*See* RJN.) Should the Court determine it cannot  
28 consider the elements of the ride, however, Defendants’ motion should nevertheless  
be granted because the cited elements are not copyrightable, and the works are not  
substantially similar in protectable expression.

ships appearing in dark weather and storms; numerous pirate skeletons (two pierced with swords); cursed treasure; a battle between a pirate ship and a fort; pirates and sailors drunk on rum; skeleton pirates wearing black hats; skeletons intoning, “dead men tell no tales” and the theme song (“*Yo ho, Yo ho, a Pirate’s life for me*”).<sup>11</sup> Because “copyright does not prevent subsequent users from copying from a prior author’s work those constituent elements that are not original,” *Feist*, 499 U.S. at 350 (citation omitted), the Court must filter these elements out before applying the extrinsic test, *see Mattel*, 616 F.3d at 915–16.

## 2. After Filtering Out the Unprotectable Elements, the Works Are Not Remotely Similar

After unprotectable elements are filtered out, the extrinsic test requires the Court to appraise the similarity of expression in the “plot, themes, dialogue, mood, setting, pace, characters, and sequence of events” in the works. *Funky Films*, 462 F.3d at 1077. As demonstrated below, there is no similarity of protectable expression between the two works, much less substantial similarity.

### (a) Plot and Sequence of Events

The Ninth Circuit has refused to find substantial similarity when two works proceed from a common premise but execute their plotlines in substantially different ways. *See Benay v. Warner Bros. Entm’t, Inc.*, 607 F.3d 620, 625 (9th Cir. 2010) (concluding that two works told “very different stories” despite the fact both “share[d] the historically unfounded premise of an American war veteran going to Japan to help the Imperial Army by training it in the methods of modern Western warfare for its fight against a samurai uprising”); *Funky Films*, 462 F.3d at 1077–78 (rejecting a claim of substantial similarity between two works that both involved the patriarch of a family that runs a funeral home dying and leaving the business in the

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<sup>11</sup> There are also numerous elements in the ride that Plaintiffs incorporated into the Screenplay that do not have analogues in the Disney motion pictures, such as a sign reading “Take a Wench Fer Yer Bride,” a mysterious redhead hiding among the “wenches” at the auction, and a Spanish townspeople named Carlos. (*See* Screenplay at 12, 14, 18.)

1 hands of an estranged son). When two works have plots that develop “quite  
2 differently,” there is no substantial similarity and no infringement. *Funky Films*,  
3 462 F.3d at 1078.

4 That is precisely the case here. The Screenplay and the *Pirates of the*  
5 *Caribbean* pictures start from the same generic premise—a conflict between a pirate  
6 captain and his first mate. In *Pirates of the Caribbean*, Sparrow’s first mate  
7 Barbossa mutinies and strands Sparrow on an island. In the Screenplay, Nefarious  
8 and his first mate Davey Jones are thrust into conflict when Jones refuses to give  
9 Nefarious the second half of a treasure map.

10 Beyond that premise, the two plots have essentially nothing in common. The  
11 Screenplay’s plot centers on a ragtag group of orphans, the Rascals, who dream of  
12 becoming pirates. They have heard the legends of Nefarious and Jones, but the  
13 Jones they know is a drunk, disillusioned with piracy and full of regret for having  
14 caused Jane’s death. The principal action in the plot revolves around two ongoing  
15 searches for two halves of a single treasure map: Nefarious is searching for Jones,  
16 believing that he has the other half of the map, while the Rascals, who have Jones’s  
17 half of the map, are searching for Nefarious’s.<sup>12</sup> Ultimately, those two searches  
18 collide on Calavera Island, where the Rascals finally find the second half of the map  
19 and Nefarious finds Jones, who shakes out of his malaise and saves the children as  
20 the brave privateer he once was. At the end of the Screenplay, the Rascals learn,  
21 from Jones, that piracy does not pay: the treasure they had hunted turns out to be  
22 impossible to collect, and in the course of seeking it, their mentor Jones appears to  
23 die. Only once they renounce piracy are they finally able to defeat Nefarious and  
24 reunite with their surrogate parents, Jane and Jones.

25 \_\_\_\_\_  
26 <sup>12</sup> This “hunt for pieces of a map” plot is common in the pirate genre. For example,  
27 the 1995 motion picture *Cutthroat Island*—which clearly inspired the “original  
28 artwork” Plaintiffs prepared in connection with the Screenplay—tells the story of a  
pirate, played by Geena Davis, who possesses one piece of a treasure map to a  
mysterious island and goes in search of the other two pieces. See Renny Harlin,  
*Cutthroat Island* (1995); [https://en.wikipedia.org/wiki/Cutthroat\\_Island](https://en.wikipedia.org/wiki/Cutthroat_Island).



1       *Pirates of the Caribbean*'s plot is fundamentally different. It does not involve  
2 any children, much less a large group of them. None of the plot elements involving  
3 the Rascals that form the majority of the action in the Screenplay has any analogue  
4 in Disney's pictures: there is no group of orphans, no children who dream of  
5 becoming pirates, and no plot dynamic in which an adult pirate serves as a surrogate  
6 father to the children.

7       In this respect, Plaintiffs' claims suffer from the same problem as those  
8 identified in *Funky Films*. There, both works told the story of a small funeral home  
9 operated by two brothers after the sudden death of their father. 472 F.3d at 1077.  
10 The Ninth Circuit observed that the works shared numerous similarities—including  
11 ones far more striking than those Plaintiffs identify here. For example, in both  
12 works, the older brother moved home from a faraway city, clashed with his  
13 conservative younger brother, and initially refused to participate in the family  
14 business. *Id.* at 1077–78. But the Ninth Circuit held that, upon close examination,  
15 the plots were dissimilar: one was “a murder mystery,” while the other was a drama  
16 about the character struggling to deal with “the cataclysmic death of the father.” *Id.*  
17 at 1078. So too here: whatever plot similarities the works may share (and they are  
18 far fewer than the similarities between the works in *Funky Films*), the plots unfold  
19 very differently because the Screenplay is about a band of children and the *Pirates*  
20 *of the Caribbean* pictures are not.

21       But even when the elements of the children are disregarded, the plots have  
22 little in common. Unlike the Screenplay, *Curse of the Black Pearl* does not involve  
23 a search for lost treasure. Rather, it is a rescue story: Barbossa kidnaps Elizabeth,  
24 believing her to be the person he needs to break the curse afflicting his crew, and  
25 much of the rest of the picture centers on the efforts of Will, Sparrow, and  
26 Norrington to recover her. Indeed, Barbossa and his crew are not trying to *find* lost  
27 treasure, like Nefarious and the Rascals, but trying to *return* it, and in so doing to  
28 break the curse that has made them inhuman.

1 Plaintiffs make no effort to plead any similarity in the plots of the two works.  
 2 The Complaint does not identify any plot elements that are substantially similar, and  
 3 the list of elements attached as Exhibit 5 identifies just *one single* “plot” element  
 4 that supposedly overlaps: “Supernatural ‘cursed’ pirates or ‘skull faced’ pirates.”  
 5 (Compl. Ex. 5 at 1.) Plaintiffs are wrong that this is a protectable similarity. First,  
 6 supernatural pirates are an “unoriginal component[],” not created by Plaintiffs, that  
 7 must be filtered out in applying the extrinsic test. *Mattel*, 616 F.3d at 913–14.  
 8 Countless works have borrowed the idea of supernatural pirates, from William Hope  
 9 Hodgson’s 1909 *The Ghost Pirates* to Richard Wagner’s 1843 opera *The Flying*  
 10 *Dutchman*. In any event, the idea of a “curse,” and of skeletal pirates who speak, is  
 11 in Disney’s ride (on which the Disney pictures are based). Second, the idea of  
 12 supernatural pirates is expressed differently in the works. In the Screenplay the  
 13 pirates are “skull faced,” but they are not actually skeletons: Nefarious’s crew paint  
 14 their faces to *look like* skulls. (See Screenplay at 46 (describing Stitch and Daggers  
 15 as “faces ... painted into TRIBAL SKULLS”).) In *Curse of the Black Pearl*,  
 16 Barbossa’s crew are cursed men who become skeletons in the moonlight.<sup>13</sup>

### 17 (b) Characters

18 Plaintiffs allege that Sparrow is substantially similar to the Screenplay’s Jones  
 19 character. (Compl. ¶ 13.) Plaintiffs further allege that the key similarity between  
 20 Sparrow and Jones is that they are both “good m[e]n,” as opposed to the “evil,  
 21 loathsome, [and] feared” pirates depicted in most pirate works. (*Id.* ¶¶ 11, 13.)

22 As an initial matter the idea of a “good pirate” is not copyrightable; it is a  
 23 “[g]eneral plot idea[]” that cannot be monopolized by any one author. *Berkic*, 761  
 24 F.2d at 1293. Jones and Sparrow also have little in common. Jones is

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25  
 26 <sup>13</sup> The Appendix adds nothing to this analysis, as the plot similarities it points to are  
 27 trivial. For example, in *Dead Man’s Chest*, Davy Jones can set foot on land once  
 28 every ten years. Plaintiffs compare this to the fact that in the Screenplay, ten years  
 elapse between the prologue and the subsequent action. (Appendix at 8.) It goes  
 without saying that Plaintiffs cannot monopolize the number 10.



1 unambiguously the hero of the Screenplay, and he follows a conventional hero's  
 2 tale. He begins by making a terrible mistake: he prioritizes his greed for treasure  
 3 over the love of his life, Jane, which leads to (what he believes is) her death. Ten  
 4 years later, he has renounced his life of piracy—"No more maps. No more treasure,"  
 5 he tells the Rascals early in the script (Screenplay at 28)—but is a shell of the man  
 6 he used to be, spending his days alone drinking rum. When he reunites with Jane,  
 7 and is presented with an opportunity to save the Rascals, he is redeemed. At a  
 8 crucial moment, when the Rascals believe Jones has abandoned them again, he  
 9 emerges heroically: "DAVEY JONES is back! Face clean-shaven, hair pinned back  
 10 in a tail, dressed like the young rogue he once was, dashing and brave." (*Id.* at 79.)

11 From that point Jones serves as the moral center of Plaintiffs' story. After he  
 12 bravely fights on behalf of the Rascals, he reminds Jane that he is doing so for love:  
 13 "[I]f you think I'm doing this for that damned treasure, you're wrong! Those kids  
 14 and you are all I have, and I'm not losing them." (*Id.* at 86.) At the end of the  
 15 Screenplay, Jones, having rid the Caribbean of the evil Nefarious, is dressed neatly  
 16 as a privateer, with his "family"—Jane and the Rascals—at his side.

17 Sparrow, by contrast, is a morally ambiguous antihero who repeatedly *refuses*  
 18 to renounce piracy. Unlike Jones, who regrets his pirate days, Sparrow loves the  
 19 pirate life, so much so that when anyone calls him "Jack" or "Sparrow," he corrects  
 20 them with the full honorific: "*Captain Jack Sparrow.*" (*Curse of the Black Pearl*, at  
 21 17:44.) Sparrow has many flaws. He lies constantly, particularly to embellish his  
 22 reputation. He tells everyone he escaped from the island where Barbossa marooned  
 23 him by strapping two sea turtles together, but later, when he is marooned a second  
 24 time, he admits that he actually escaped by trading with rum runners. Sparrow is  
 25 also portrayed as deeply self-interested. At a key moment, he is willing to barter  
 26 with Barbossa against the interests of Will and Elizabeth, offering to reveal Will's  
 27 true identity as Bill Turner's son in exchange for again becoming the captain of the  
 28 *Black Pearl*. The picture even makes a joke of Sparrow's shifting loyalties: at one

1 point, when Elizabeth arrives to discover Sparrow fighting Barbossa, she asks,  
 2 “Whose side is Jack on?” Will replies, “At the moment?” (*Id.* at 2:00:11.)

3 In short, Jones and Sparrow are not remotely similar, even at the generic level  
 4 of being “good pirates.” (Indeed, other than a brief stint in the prologue, Jones is  
 5 not a pirate at all.) Nor do they have anything else in common as characters.  
 6 Jones’s backstory is that he was a first mate who had a dispute with Nefarious over  
 7 the treasure map. Sparrow’s backstory is that he was captain of the *Black Pearl*  
 8 until Barbossa led a mutiny against him and marooned him on an island. Jones is a  
 9 “dashing,” “clean-shaven” rogue, while Sparrow, famously modeled on Keith  
 10 Richards, walks with a drunken lilt and wears a signature hat. Jones is not a comic  
 11 character in the Screenplay, while Sparrow’s dialogue is constantly clever and witty.

12 The other characters in the Screenplay either have no analogues in the *Pirates*  
 13 *of the Caribbean* pictures or have analogues whose expression is radically different:

- 14 • There are no counterparts in *Pirates of the Caribbean* to the six  
 15 children who are the principal characters in the Screenplay. *See Benay*,  
 16 607 F.3d at 627 (no substantial similarity where “[t]here are a number  
 17 of important characters in the Film and the Screenplay who have no  
 18 obvious parallel in the other work”).<sup>14</sup>
- 19 • In the Screenplay, Jane is a stock damsel character who is in love with  
 20 Jones. The Screenplay says nothing about her background. In *Pirates*  
 21 *of the Caribbean*, the character most analogous to Jane, Elizabeth, is  
 22 the daughter of a colonial governor. She is not in love with Sparrow,  
 23 but rather with Will, who is a blacksmith, not a pirate.
- 24 • The villains in the two works are both evil pirate captains with

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25  
 26 <sup>14</sup> The Appendix suggests that Gibbs, Sparrow’s first mate, is similar to Stink  
 27 because Gibbs is in a pigpen when he is introduced in *Curse of the Black Pearl*.  
 28 (Screenplay at 13, 16; Appendix at 3.) The characters are unlike: Gibbs is an adult  
 who is briefly locked in a pigpen, while Stink a flatulent child.

1 supernatural elements. But Barbossa, the villain in *Pirates of the*  
 2 *Caribbean*, can transform into a skeleton because he has been cursed  
 3 by Cortes's gold. In the Screenplay, Nefarious became a ghost pirate  
 4 after being swallowed and regurgitated by a sea monster. Further,  
 5 Barbossa becomes a hero over the course of the pictures, ultimately  
 6 sacrificing himself for his daughter.

- 7 • Plaintiffs compare Nefarious's crewmembers Stitch and Dagger to two  
 8 crewmembers of Barbossa's in *Pirates of the Caribbean*, Pintel and  
 9 Ragetti. (See Appendix at 2.) Both Stitch and Dagger and Pintel and  
 10 Ragetti are henchmen of the pirate villain. But they are nothing alike:  
 11 Stitch and Dagger are violent, humorless pirates defined only by their  
 12 weapons, while Pintel and Ragetti provide comic relief throughout each  
 13 of the first three *Pirates of the Caribbean* motion pictures.

#### 14 (c) Themes

15 The Screenplay is overtly moralistic, as befits a children's story. It has clear  
 16 villains and heroes, and its central theme is that greed and piracy are bad. At the  
 17 beginning of the story, the six orphaned Rascals have a romantic conception of the  
 18 pirate life. With their heads full of tales of the exploits of Nefarious and Jones, the  
 19 Rascals are determined to become pirates. They act like it, too. In the first scene  
 20 the Rascals are introduced, they are depicted leering at the Woman in Red at the  
 21 "auction of wenches" and robbing a "peg leg pirate" of his bag of gold. (Screenplay  
 22 at 14–16.) Jones is the conscience of the story, a father figure to the orphan Rascals.  
 23 He knows the true costs of piracy, as he believes his greed for treasure led to Jane's  
 24 death at Nefarious's hands. At every opportunity, he lectures the Rascals on the  
 25 downsides of piracy, telling them, "There is no such thing as LOYALTY or  
 26 MERCY between pirates." (*Id.* at 66.)

27 The nature of the treasure also reinforces the theme that greed has great costs.  
 28 When the Rascals finally find a cavern full of rubies at the end of the story, Jones

1 tells them that it is a trap: “Once removed, water will begin to fill through the hole  
 2 you created, drowning us all.... You can’t take it, you can only die with it.” (*Id.* at  
 3 93.) Nefarious’s greed leads to his downfall: he orders his men to collect the jewels,  
 4 then dies in the subsequent flooding. Speaking to Jane, Jones summarizes the  
 5 Screenplay’s theme: “It’s not about the treasure, Jane.... Fate brought us here for a  
 6 reason ... to show us that what we have is far greater than any treasure!” (*Id.* at 97.)

7       The *Pirates of the Caribbean* pictures are far more morally ambiguous.  
 8 Indeed, one of their central themes is that good and evil are not easy to distinguish.  
 9 Although Barbossa is *Curse of the Black Pearl*’s “villain” and Sparrow the film’s  
 10 nominal “hero,” both men are conflicted and ambiguous characters. Barbossa, after  
 11 all, is motivated by a desire to save his men from the terrible curse under which they  
 12 have been suffering for years (and ultimately becomes a hero in later films).  
 13 Sparrow, on the other hand, has a more selfish motivation: to recover his captaincy  
 14 of the *Black Pearl*, which to him represents freedom. This theme of moral  
 15 ambiguity continues throughout the Disney franchise. In the opening scene of *At*  
 16 *World’s End*, privateers working for the East India Trading Company conduct a  
 17 mass hanging of pirates, including a child—complicating the simplistic narrative of  
 18 “bad” pirates and “good” privateers reflected in the Screenplay.

#### 19                               (d)     Dialogue

20       “To show substantial similarity based on dialogue, a plaintiff must establish  
 21 ‘extended similarity of dialogue.’” *Shame on You Prods., Inc. v. Elizabeth Banks*,  
 22 120 F. Supp. 3d 1123, 1156 (C.D. Cal. 2015), *aff’d sub nom. Shame on You Prods.,*  
 23 *Inc. v. Banks*, 690 F. App’x 519 (9th Cir. 2017). Ordinary words and phrases are  
 24 not entitled to copyright protection, nor are “[p]hrases and expressions conveying an  
 25 idea typically expressed in a limited number of stereotyped fashions ....” *Narell v.*  
 26 *Freeman*, 872 F.2d 907, 911–12 (9th Cir. 1989).

1 In the Appendix, Plaintiffs fail to identify any extended similarity of dialogue  
 2 sufficient to support a copyright claim.<sup>15</sup> The few examples of remotely similar  
 3 dialogue Plaintiffs point to are only unprotectable phrases or expressions. For  
 4 example, both Sparrow and Jones are slapped by women in the two works. Sparrow  
 5 responds, “[I’m] not sure [I] deserved that,” while the woman who slaps Jones tells  
 6 him, “You had that coming.” Plaintiffs claim this is a “similarity.” (Compl. Ex. 5,  
 7 at 3.) Even if the utterances were similar, which they are not, they are stereotypical  
 8 one-liners when a character is slapped by a romantic interest. They are not  
 9 protectable.

10 In fact, the characters in the works speak very differently. In the Screenplay,  
 11 Nefarious speaks like a pirate-movie cliché: “Gather our numbers, lad. Hijack thar  
 12 main vessel and pipe the rest of those ruddy wreckages away! We’re going after  
 13 Jones!” (Screenplay at 58.) By contrast, the villain in *Curse of the Black Pearl*,  
 14 Hector Barbossa, addresses his crew in a florid, literate pirate patois:

15 Gentlemen, the time has come! Our salvation is nigh! Our torment is  
 16 near an end! For ten years we've been tested and tried, and each man  
 17 jack of you here has proved his mettle a hundred times over, and a  
 18 hundred times again! Suffered, I have! Punished, we were, the lot of us.  
 Disproportionate to our crime! Here it is! The cursed treasure of Cortés  
 himself. Every last piece that went astray, we have returned. Save for  
 this.

19 (1:10:01.) In the same vein, Sparrow’s witty, idiosyncratic manner of speech has no  
 20 analogue in Davey, whose dialogue is generic and indistinct. Further, the Screenplay  
 21 makes frequent anachronistic references to pop culture (*see, e.g.*, Screenplay at 21  
 22 (character referring to “R.E.S.P.E.K.T.”)), while the pictures do not.

### 23 (e) Mood and Pace

24 The mood and pace of the Screenplay is fast and slapstick, as befits a work  
 25 intended for children. Most of that work is spent with the Rascals wandering around  
 26

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27 <sup>15</sup> Plaintiffs do identify the lyrics of the theme song to Disney’s own ride, seemingly  
 28 suggesting Disney *copied the Screenplay* in using Disney’s own song. (Appendix at  
 5, 13.)

1 solving puzzles and cracking juvenile jokes. The action is extremely fast: the  
 2 Rascals reach Calavera Island on page 65 of the screenplay, and just 10 pages later,  
 3 the Rascals have Nefarious's map in hand, having hiked through the jungle, crossed  
 4 a ravine over crocodile-infested water, and broken into the "Pit of the Dead" where  
 5 the map is hidden.

6 The action in *Curse of the Black Pearl* occurs more slowly and in more  
 7 locales, with the characters going back and forth between Jamaica, Tortuga, the  
 8 island on which Sparrow and Elizabeth are marooned, and Isla de Muerta. And the  
 9 mood of the films is far darker than the Screenplay; it is impossible to imagine the  
 10 execution scenes that open *At World's End* taking place in the Screenplay.

#### 11 (f) Setting

12 Both the Screenplay and the *Pirates of the Caribbean* pictures are chiefly set  
 13 in the Caribbean. Because virtually all pirate works take place in the Caribbean, the  
 14 setting is an unprotectable *scene a faire*. See, e.g., *Cavalier v. Random House, Inc.*,  
 15 297 F.3d 815, 824 (9th Cir. 2002) (night sky setting was unprotectable *scene a faire*  
 16 where it "naturally and necessarily flows from the basic plot premise").

#### 17 IV. CONCLUSION

18 Because the Complaint does not plausibly plead substantial similarity, it does  
 19 not state a claim for copyright infringement. Further, it is not possible that Plaintiffs  
 20 could amend their pleading to allege facts that could state an infringement claim.  
 21 See *Campbell v. The Walt Disney Co.*, 718 F. Supp. 2d 1108, 1116 (N.D. Cal. 2010)  
 22 (failure to establish substantial similarity as a matter of law is a "defect [that] cannot  
 23 be cured by amendment"). Thus, Disney respectfully requests that the Court dismiss  
 24 the Complaint with prejudice.

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